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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NEWSWEEK, INC.,
Petitioner,
v.
DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, LAWRENCE FUCHS, and ROBERT MULLIGAN,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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BRIEF AS *AMICUS CURIAE* OF COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONER

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondents have been obtained and filed with the Clerk of the Court.*

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation (COST) is a non-profit trade association that was organized in 1969 as an

* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a membership of over 460 multi-state corporations engaged in interstate and international commerce. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities.

Many of COST's members are engaged in business in the State of Florida, and thus have a particular interest in the ultimate resolution of the remedial landscape in Florida, as well as other states. However, COST's concern transcends the issues associated with this case and relates to the national Due Process issues associated with remedial schemes in several other cases, including *General Motors Corp. v. Kansas City*, 895 S.W.2d 59 (Mo. Ct. App. 1995) *cert. denied*, 116 S. Ct. 277 (1995) (denial of refunds irrespective of the fact that the case presented nearly an identical fact pattern as the one this Court found unconstitutional in *Reich v. Collins*); and *Kerr v. Waddell*, 916 P.2d 1173 (Ariz. Ct. App. 1996) (tax refunds denied based on failure to comply with a subsequent procedural requirement). Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

Florida provided a remedy which allowed the petitioner to pay the contested tax and seek subsequent relief. The respondent denied the petitioner this postdeprivation relief, finding instead that the petitioner should have availed itself of a predeprivation remedy. The respondent's denial of the petitioner's postdeprivation refund claim on the grounds that the taxpayer could have availed itself of a predeprivation remedy violates the Due Process Clause. In *Reich v. Collins*, 513 U.S. 106 (1994), this Court struck down an identical claim and held that a taxpayer could pursue a valid postdeprivation remedy regardless of the availability of a predeprivation remedy. The present case falls squarely within the reasoning of *Reich*, and thus the

availability or unavailability of a predeprivation remedy should be ignored in determining whether the petitioner is entitled to a refund of an illegally collected tax.

Further, the predeprivation remedy identified by the respondent and the Court of Appeal was *not* available to the petitioner, because the statutory predeprivation remedy did not, by its own terms, apply to the petitioner's factual situation or legal posture. By retroactively altering the availability of the predeprivation remedy, the respondent engaged in the type of "bait and switch" of remedies that this Court condemns. *Reich v. Collins*, 513 U.S. 106 (1994). Therefore, without a predeprivation remedy, the State was required to provide meaningful backward looking relief to rectify any unconstitutional deprivation. *Harper v. Virginia Dep't of Rev.*, 509 U.S. 86, 101 (1993).

Finally, even if the predeprivaiton remedy was available, it did not constitute a "clear and certain" remedy, as that standard has been articulated in this Court's prior decisions. *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280 (1912); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). No taxpayer challenging the imposition of the sales and use tax has ever availed itself of this remedy. Therefore, the "average taxpayer" could not have concluded that the remedy was available. Thus, the alleged predeprivation remedy did not meet Due Process requirements.

ARGUMENT

I. ASSUMING *ARGUENDO* THAT THE STATE PROVIDED BOTH A PREDEPRIVATION AND A POSTDEPRIVATION REMEDY, THE RESPONDENT CANNOT SUBSEQUENTLY FORECLOSE THE REMEDIAL SCHEME THE PETITIONER SELECTED.

The respondent may not force the petitioner to select a predeprivation remedy when the State provided both predeprivation and postdeprivation remedies. This Court's

analysis in *Reich v. Collins*, 513 U.S. 106 (1994) is wholly applicable to the present case. The taxpayer in *Reich* paid a tax that was subsequently found to be illegally imposed. As a result, the taxpayer selected to pursue a postdeprivation remedy. The *Reich* Court held that the State could not offer the postdeprivation remedy and subsequently deny its availability after payment of the contested tax:

> [T]he Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these [predeprivation] procedures—an issue on which we express no view—no reasonable taxpayer would have thought they represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes.

Reich, 513 U.S. at 113.

While the petitioner was subjected to the same fate as that of the taxpayer in *Reich* (*i.e.*, the offering of a remedy only to have it withdrawn), the Court of Appeal neglected to follow, or even mention, the *Reich* opinion in its decision.[1] This Court found in *Reich* that such State activity violates the Due Process clause contained in the Fourteenth Amendment to the United States Constitution. Had the Court of Appeal acknowledged the *Reich* holding, the court would have arrived at the same conclusion: the petitioner "was entitled to pursue what appeared to be a 'clear and certain' postdeprivation remedy, regardless of the State's predeprivation remedies." *Reich*, 513 U.S. at 113. Therefore, the availability of a

[1] While the Court of Appeal ignored the *Reich* decision, the court did, however, analyze and distinguish *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). However, the *McKesson* Court's holding did not address whether a State could withdraw a clear and certain postdeprivation remedy after payment of a contested tax.

predeprivation remedy is of no moment; the petitioner selected a valid postdeprivation remedy authorized by the State. According to this Court's jurisprudence, the State cannot subsequently inform the petitioner that it selected the wrong remedy.

II. THE SOLE REMEDY AVAILABLE TO THE TAXPAYER WAS POSTDEPRIVATION RELIEF.

This Court has held that a State "must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990). This Court's decisions make clear that States are granted wide latitude in crafting a method of providing taxpayers relief from an unlawfully collected tax. *McKesson*, 496 U.S. at 36. The State has the flexibility to provide an exclusively predeprivation remedial scheme, postdeprivation remedial scheme, or a hybrid of the two. *Reich v. Collins*, 513 U.S. 106, 110-11 (1994); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-748 (1974).

However, the taxpayer in this case was not presented with a "meaningful predeprivation remedy," leaving the petitioner to pursue only postdeprivation relief.[2] In finding for the respondent, the Florida Court of Appeal held that the taxpayer could have availed itself of a predeprivation remedy contained in Fla. Stat. Section 72.011, allowing the taxpayer to file suit in circuit court to contest

[2] In fact, this Court has noted the compelling justifications for allowing States to offer only postdeprivation remedies. *McKesson*, 496 U.S. at 37 ("[a]llowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security"). However, where the state has elected to protect its fiscal security, this Court has held the State is constitutionally required to provide meaningful backward looking relief in the form of a postdeprivation remedy. *Harper v. Virginia Dep't of Rev.*, 509 U.S. 86, 101 (1993), *quoting McKesson*, 496 U.S. at 31 (footnotes omitted).

the legality of the tax and to pay the amount of the contested tax into the registry of the court. *Newsweek, Inc. v. Department of Rev.*, 689 So.2d 361, 364 (Feb. 18, 1997). The relief contained in section 72.011 is available in two instances: challenging the legality of an assessment and challenging the denial of a refund claim. Neither were available in the present case. The petitioner's payment of the tax negated the need for the respondent to issue an assessment. Further, the court's analysis presupposes that the petitioner was not required to pay the contested tax, negating the possibility of a refund request and subsequent denial. Therefore, the predeprivation remedy was not available to the petitioner.

For the Court of Appeal to identify the predeprivation remedy contained in section 72.011 as the sole avenue of recourse after the petitioner's payment of the tax is exactly the kind of "bait and switch" that this Court has previously struck down: "But what a State may not do . . . is to reconfigure its scheme, unfairly, in mid-course—to 'bait and switch,' as some have described it." *Reich v. Collins*, 513 U.S. 106, 111 (1994). The petitioner complied with the only remedial scheme available to it—paying the contested tax and requesting a refund. The respondent should be prevented from engaging in the post-payment reengineering of its remedy statutes that this Court explicitly denounced in *Reich*.

III. EVEN IF THE PREDEPRIVATION RELIEF WAS AVAILABLE TO THE PETITIONER, SUCH RELIEF DID NOT CONSTITUTE A "CLEAR AND CERTAIN" REMEDY.

Whatever approach a State chooses to provide taxpayers (predeprivation, postdeprivation, or a hybrid), the remedial scheme must be "clear and certain." *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). The Florida Court of Appeal held that the "sales tax paid by [petitioner] could properly have been

contested in a predeprivation proceeding pursuant to section 72.011." *Newsweek*, 689 So.2d at 363. In order for this or any predeprivation remedy to qualify as "clear and certain," it must "provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." *McKesson*, 496 U.S. at 38. In determining whether a State provided a clear and certain remedy, this Court has inquired whether the "average taxpayer" would conclude that the remedy was available. *Reich*, 513 U.S. at 111.

Assuming *arguendo* that the predeprivation remedy was available to the petitioner, the petitioner was not afforded a "meaningful opportunity" to avail itself of the remedy. Neither the Court of Appeal nor the respondent identified a single instance in which a taxpayer challenging the imposition of the State's sales and use tax availed itself of the remedy provided by section 72.011. While a State can fashion a new remedy anytime it so chooses, it cannot retroactively wield a new remedy as a shield against a liability due under the existing postdeprivation remedial scheme. It is unlikely that the "average taxpayer" would contemplate that the remedy set forth in section 72.011 pertains to taxpayers challenging the validity of the State's sales and use tax. Therefore, the predeprivation remedy that the Court of Appeal identified and relied upon as the exclusive remedy for the first time cannot be construed as "clear and certain" under this Court's prior decisions.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Florida Court of Appeal.

Respectfully submitted,

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